

New York Law of Exclusive Occupancy of Marital Home¹

Exclusive Occupancy of Marital Home - Burden of Proof - Domestic Relations Law § 234

Domestic Relations Law § 234, provides, in part, that "in any action for divorce, for a separation, for an annulment or to declare the nullity of a void marriage, the court may . . . (2) make such direction, between the parties, concerning the possession of property, as in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. Such direction may be made in the final judgment or by one or more orders from time to time before or subsequent to final judgment, or by both such order or orders and final judgment."

Domestic Relations Law §236(B)(5)(f) of the, enacted as part of the Equitable Distribution Law, provides that in actions governed by Domestic Relations Law §236(B), in addition to making a disposition of separate and marital property as set forth in Domestic Relations Law §236(B)(5), "The court may make such order regarding the use and occupancy of the marital home and its household effects as provided in section two hundred thirty-four of this chapter, without regard to the form of ownership of such property."

The purpose of Domestic Relations Law §236(B)(5)(f) appears to be solely to make it clear that the Supreme Court may award use and occupancy of the marital home, in equitable distribution actions, even though title to it remains solely in the name of the other spouse, as there is no reason why Domestic Relations Law §234 would not apply to pendente lite orders made in such an action. However, Domestic Relations Law §236(B)(5) only applies in actions where a disposition of separate and marital property is made. Thus, there must be a divorce, dissolution annulment, or declaration of the nullity of a void marriage for the court to exercise its authority under this section, or the proceeding must be to obtain a distribution of marital property following a foreign judgment of divorce.

Where the parties are childless and healthy, there is no compelling need to award exclusive occupancy to the marital home to either party.² Thus, absent unusual

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² In *Ierardi v Ierardi* (1989, 2d Dept) 151 App Div 2d 548, 542 NYS2d 322, the Appellate Division held that where the parties are childless and healthy there is no compelling reason to award exclusive occupancy of the marital residence to either party. However, there is also no compelling reason to direct its sale to a third party. When only one of the parties expresses an interest in continuing to live in the marital residence, a court should give that party the option of purchasing the other spouse's equitable share of the residence's value.

or extenuating circumstances, unless title to the marital home is awarded to either spouse, the marital home should be ordered sold in the final judgment.³ The presence of young children in the marital home is an extenuating circumstance. Thus, ordinarily exclusive occupancy of the marital home is awarded to the spouse who is awarded custody of the parties' minor children.⁴

³ In *Wojtowicz v Wojtowicz* (1991, 4th Dept) 171 App Div 2d 1073, 569 NYS2d 248, the Appellate Division modified the judgment of divorce by deleting the award of exclusive possession of the marital home to the wife until June 1992 and substituting a direction that the house be sold immediately. Absent unusual or extenuating circumstances, the sale of the marital residence should be ordered at the time of the divorce. Ordinarily, exclusive possession is granted to the spouse who is awarded custody of the parties' minor children. Exclusive possession of the marital residence should not be awarded here because the only child of the parties living home was a 23-year-old, adult child, and the husband should not be compelled to subsidize his adult child by providing living quarters for him.

See also, *Tanner v Tanner* (1985, 3d Dept) 107 App Div 2d 980, 484 NYS2d 700.

In *Basos v. Basos*, 243 A.D.2d 932, 663 N.Y.S.2d 387 (3d Dep't 1997) the Appellate Division stated that generally, absent unusual circumstances, the marital residence should be sold following the judgment of divorce. Although there appeared to be no reason for not applying this rule here, it was not necessary to modify Supreme Court's award since defendant, without court intervention, could achieve the distribution he sought as there was nothing preventing him from selling the marital residence or a portion of the surrounding acreage and paying the distributive award since the judgment provided him with the right of prepayment. The distributive award was less than one half of the marital residence's \$61,000 valuation.

⁴ In *Flanagan v Flanagan* (1986, 2d Dept) 118 App Div 2d 681, 500 NYS2d 34, the Appellate Division ordered that the plaintiff wife, who was awarded custody of the two children of the marriage, was to have exclusive possession and occupancy of the marital residence until two years after the entry of the judgment of Special Term.

Knapp v Knapp, (1984, 3d Dept) held that exclusive occupancy is usually given to the custodial parent.

In *Marano v Marano* (1994, 2d Dept) 200 AD2d 718, 607 NYS2d 359, the Appellate Division held that the trial court erred in ordering the immediate sale of the marital residence. The evidence established that the need of the wife, as custodial parent of the parties' two children, to occupy the marital residence, outweighed the parties' need to sell it and there was no evidence that the wife was unable to financially maintain it. The Appellate Division held that the wife should be awarded exclusive possession of the marital residence, at her sole expense, until the parties' youngest child attained the age of 18 years or is sooner emancipated. At that time, the marital residence was to be sold in accordance with the remaining provisions of the judgment of divorce.

In *Leabo v Leabo* (1994, 2d Dept) 203 AD2d 254, 610 NYS2d 274, the parties were married in 1963 and separated in 1987. They had 8 children, 4 of whom were under the age of 18 and resided with the wife at the marital residence. The Appellate Division affirmed the award of exclusive occupancy of the marital residence to the wife. Courts favor allowing the custodial parent to remain in the marital residence, at least until the youngest child reaches 18 or is sooner emancipated. There was no evidence that the wife could obtain comparable housing for herself and the children at a lower cost, that she was financial incapable of maintaining the marital residence, or that either party was in immediate need of his or her share of the sale proceeds.

In *Sommers v Sommers* (1994, 4th Dept) 203 AD2d 975, 611 NYS2d 971, the Appellate Division held that Supreme Court did not err in awarding the wife exclusive occupancy of the marital residence or in directing that it be sold when the youngest child was emancipated. The wife was awarded custody of the party's two children who were 12 and 10 years old at the time of trial and who have lived in that house their entire lives. The husband's need to receive his share immediately is outweighed by the needs of the wife and the children to occupy the home.

In *Rice v. Rice*, 222 A.D.2d 493, 634 N.Y.S.2d 761 (2d Dep't 1995), the Appellate Division held that the trial court did not improvidently exercise its discretion by granting the wife exclusive possession of the marital residence until the youngest child finishes high school. It was not shown that either party was in immediate need of the proceeds from a sale of the marital residence, that comparable housing was available in the same area at a lower cost, or that the parties were financially incapable of maintaining the residence until the youngest child graduated from high school.

In *Mayeri v. Mayeri*, 220 A.D.2d 647, 632 N.Y.S.2d 833 (2d Dep't 1995), leave to appeal dismissed in part, denied in part, 88 N.Y.2d 913, 646 N.Y.S.2d 979, 670 N.E.2d 220 (1996), the Appellate Division held that the trial court did not improvidently exercise its discretion in awarding the wife exclusive occupancy of the marital residence. The husband failed to establish that he was in immediate need of the proceeds of the sale of the former marital residence, that comparable housing was available to the wife in the same area at a lower cost or that the parties were financially incapable of maintaining the residence. However, the judgment was modified to provide that the wife's exclusive occupancy would end when the parties' youngest child, who was 12, turns 18 or is sooner emancipated.

In *Presworsky v. Presworsky*, 224 A.D.2d 506, 637 N.Y.S.2d 487 (2d Dep't 1996), the wife was awarded exclusive occupancy of the marital residence until the youngest child attained the age of majority or was sooner emancipated. The husband was directed to pay all the carrying charges of the marital residence including the mortgage, real estate taxes and repairs. However, he would be reimbursed by the wife for these expenditures from her share of the proceeds upon the sale of the residence.

The Appellate Division held that the Supreme Court properly awarded the wife exclusive occupancy of the marital premises. She had been awarded custody of the parties' three unemancipated children, whose best interests would be served by remaining in the marital home.

In *Litwack v. Litwack*, 237 A.D.2d 580, 655 N.Y.S.2d 613 (2d Dep't 1997) the plaintiff appealed from so much of a judgment as granted exclusive possession of the marital residence to the defendant until the parties' twins reach age 25. The judgment was modified to reduce the term until the twins reach age 18.

In *Crane v. Crane*, 264 A.D.2d 749, 694 N.Y.S.2d 763 (2d Dep't 1999), the Appellate Division held that under the circumstances of this case, the mother should have been granted exclusive occupancy of the former marital residence. The parties' children resided in that house since their birth, attended school, and had friends in the community. Moreover, there was no evidence that comparable housing would be available to the mother in the same area at a lower cost, and the sale of a second house owned by the parties would help alleviate the father's financial difficulties. The mother, as the custodial parent, was awarded exclusive possession of the marital residence until the youngest child reaches the age of 18.

While ordinarily there is a preference to award the custodial parent exclusive occupancy, Domestic Relations Law §236(B)(5)(f) authorizes the court to award one spouse exclusive occupancy of the "separate" property of the other spouse. Where the custodial parent receives adequate funds to pay for alternative housing, exclusive occupancy is unwarranted.⁵

Extenuating circumstances have been held to include severe financial difficulties. Thus, even though there are minor children, the immediate sale of the marital home has been directed in the judgment of divorce where the expenses of maintaining it are wastefully extravagant⁶ or where the parties are financially incapable of maintaining it after the dissolution, and lower cost housing is available.⁷ Thus, the marital home is usually ordered to be sold where the financial need of the parties for their share of the proceeds of its sale outweigh the need of the custodial parent to occupy the home.⁸

⁵ In *Wood v Wood* (1988, 2d Dept) 139 App Div 2d 506, 526 NYS2d 608, the Appellate Division affirmed that directed the immediate sale of the marital home. While ordinarily there is a preference to award the custodial parent exclusive occupancy, where the marital home is the separate property of the noncustodial parent and there are "adequate funds provided through maintenance, child support and the plaintiff's distributive award to pay for appropriate alternative housing, such an award is unwarranted."

⁶ *Stolow v Stolow* (1989, 2d Dept) 149 App Div 2d 683, 540 NYS2d 484, motion gr, in part, motion den, in part (2d Dept) 152 App Div 2d 559.

⁷ *Behrens v Behrens* (1988, 2d Dept) 143 App Div 2d 617, 532 NYS2d 893.

⁸ *Blackman v Blackman* (1987, 2d Dept) 131 App Div 2d 801, 517 NYS2d 167.

In *Lauer v Lauer* (1988, 2d Dept) 145 App Div 2d 470, 535 NYS2d 427, the Appellate Division affirmed those portions of the judgment of divorce that granted the husband a divorce, directed the immediate sale of the marital home and an equal division of the proceeds. The need of the wife, as the custodial parent, to occupy the home was outweighed by the financial need of the parties to sell it. The yearly carrying costs of \$34,000 exceeded the wife's income of \$30,000. Although the husband earned \$130,000 a year, it would be unduly burdensome for him to bear the cost of maintaining this home in view of his child support payments and other financial obligations and expenses. Moreover, the proceeds of the sale can be applied to the parties' substantial debts and future living expenses.

In *Parris v Parris* (1988, 2d Dept) 136 App Div 2d 685, 524 NYS2d 99, the Appellate Division held that it was proper to direct an immediate sale of the marital home with the parties to divide the net proceeds equally, and the husband to pay the outstanding bills from his share. Although he is the custodial parent, his need to occupy

It has been held that it is proper to award exclusive occupancy to the marital home to the custodial parent to enable the children to complete their high school education in the same school, where the children's labor contributed to increasing the value of the residence.⁹ It is also proper to award exclusive occupancy to the custodial parent, where the house is air conditioned in order to alleviate the child's sick condition.¹⁰

the home was outweighed by both parties' immediate need for their share of the proceeds.

In *Milewski v Milewski* (1993, 2d Dept) 197 AD2d 562, 602 NYS2d 660, the Appellate Division affirmed Supreme Court's determination directing the immediate sale of the marital residence. It held that the financial needs of the parties outweighed the wife's needs as custodial parent to exclusive possession of the marital residence.

⁹ *Sheik v Sheik* (1988, 2d Dept) 143 App Div 2d 183, 531 NYS2d 631

¹⁰ *Francis v Francis* (1989, 2d Dept) 156 App Div 2d 637, 548 NYS2d 816.